WANGSINI SDN BHD

v.

GRAND UNITED HOLDINGS BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[COMPANIES WINDING-UP NO: D5-28-40-1996]
21 MARCH 1997

COMPANY LAW: *Winding-up - Locus standi - Petitioner a house purchaser - Whether a 'creditor'*

CIVIL PROCEDURE: *Striking out - Winding-up petition - Scheme of settlement in existence - All creditors restrained from commencing or continuing with any actions against company - Whether petition oppressive and an abuse of court process - Rules of the High Court 1980, O. 18 r. 19*

LIMITATION: *Enforcement of judgment - Claim for interest on judgment sum - Whether entitled to claim interest for term exceeding six years from date on which interest was to commence - Whether relevant date is date of judgment*

COMPANY LAW: *Winding-up - Petition - Notice of demand - Amount claimed in notice in excess of amount actually due - Whether notice defective - Whether defect curable by court - Companies Act 1965, s. 218*

CIVIL PROCEDURE: *Execution - Winding-up - Petition presented six years after judgment entered - Whether leave of court necessary - Whether winding-up petition a writ of execution - Rules of the High Court 1980, O.46 r. 1*

WORDS & PHRASES: *"Neglect" - Failure to pay sum demanded in notice of demand - Failure due to dispute on amount - Whether failure to pay amounts to 'neglect' - Companies Act 1965, s. 218*

On 9 April 1985, the petitioner had bought a house from a wholly-owned subsidiary of the respondent, Bukit Ritan Realty Sdn Bhd ('BRR') and paid a 10% deposit amounting to RM33,875. BRR went into liquidation and the respondent, under a scheme of arrangement ('the scheme') pursuant to s. 176 of the Companies Act 1965 ('the Act') which was approved by the shareholders, creditors and house purchasers of BRR, assumed the debts and liabilities of BRR. Under the terms of the scheme which was sanctioned by the High Court on 4 January 1994, the house purchasers were given two options. Under Option A, the purchasers would rescind the original sale and purchase agreements and enter into new agreements with the respondent under

which the monies paid to BRR would be credited towards the purchase under the new agreement. Under Option B, the purchasers would receive a refund of RM1 for every ringgit paid. Clause 39 of the scheme also provided that the purchasers by opting for either option fully discharged the debts assumed by the respondent under the sale and purchase agreements with BRR.

The petitioner rescinded its sale and purchase agreement with BRR on 25 October 1989 and on 19 January 1990, obtained judgment for RM33,875 with interest at 8% pa from 15 March 1985 had to realisation, and liquidated damages of RM44,429.25 with interest at 8% pa from 6 November 1989 to realisation, together with costs of RM150. The petitioner served a notice under s. 218 of the Act for the sum RM130,740.65 on the respondent, and following the respondent's failure to satisfy the sum, applied to wind up the respondent pursuant to s. 218 of the Act. The petitioner argued that the respondent was responsible for the judgment debt of BRR as: (i) it had assumed all BRR's liabilities and under s. 41 of the scheme, 'all judgments, debts, interest and costs relating to any debt by BRR should be subject to Option B and satisfied in the same manner'; and (ii) it was entitled to be paid in full by the respondent under Option B. The petitioner submitted that as the respondent had failed or neglected to pay the amount in the s. 218 notice, that meant the respondent was insolvent and could not meet its liabilities.

The respondent in response, contended that: (i) it had sent a cheque for RM33,887.50 being a full cash refund of all monies paid by the petitioner on a ringgit for ringgit basis but the cheque had been kept by the petitioner's solicitors and returned three months later; (ii) the purpose of the petition was to pressure the respondent into paying BRR's judgment debt; (iii) the s. 218 notice was bad in law as the amount claimed was in excess of the actual sum payable in view of s. 6(3) of the Limitation Act 1953; and (iv) since the judgment was obtained on 19 January 1990 and the petition was presented on 30 January 1996, ie six years later, pursuant to O. 46 r. 2 of the Rules of the High Court 1980 ('the RHC'); the petitioner was required to obtain the leave of court before presenting the winding-up petition.

Held:

[1] The petitioner had *locus standi* to bring this action as the scheme under s. 176 defined 'creditors' as including house purchasers of the respondent's subsidiaries.

[2] Having elected for Option B of the scheme, the petitioner was aware of the order restraining all creditors and purchasers from commencing or continuing on with any actions against the respondent. Once the scheme had been approved, all creditors were bound by its terms, and by proceeding with the winding-up petition, the petitioner had wilfully disobeyed the order. The petition was therefore oppressive and an abuse of the process of the court.

[3] The petitioner could not claim for the full judgment sum as it had opted for Option B. The respondent was only legally obliged under the terms of the scheme to pay a sum of RM33,887.50 which it had in fact done but the cheque was returned to the respondent.

[4] The petitioner was only legally entitled to claim interest on the judgment sum for six years from the date on which the interest was stated to commence, ie for the principal sum of RM33,887.50, from 15 March 1985 to 14 March 1991, and for the liquidated damages of RM44,429.25, from 6 November 1989 to 5 November 1995. If the judgment had been silent on the issue of interest, then the statutory rate of 8% pa would apply for six years from the date of the judgment.

[5] As the amount stated in the s. 218 notice was in excess of the amount actually due, the notice was defective and *ipso facto* the petition had to be dismissed. The cases in which the court had granted a winding-up application were where the sum was admitted although the notice was defective, and they did not apply in this instance as the amount was in dispute. It would be a travesty of justice if the court were to deduct the excess amount to save the petition or to rewrite the notice.

[6] From the evidence tendered, the respondent was financially sound and was fully capable of meeting all its current liabilities. The non-payment of the sum claimed in the s. 218 notice was not by 'neglect' but by design. Where there is a serious dispute as to the sum claimed and the respondent fails to pay the sum demanded, such failure cannot fall within the meaning of neglect as provided in the Act.

[7] No leave of court was necessary before the petitioner could present its petition as the RHC did not apply to the petition which was filed under s. 218 of the Act. By O. 46 r. 1 of the RHC, a 'writ of execution' includes a writ of seizure and sale, a writ of possession and a writ of delivery. Therefore, winding-up proceedings do not come within 'writ of execution'.

Obiter dictum

[1] Before sanctioning a scheme of arrangement, the court must be satisfied that the statutory provisions have been complied with, the classes of creditors and members are fairly represented and the statutory majority approving the scheme is acting in good faith. Where the proposed scheme has obtained the requisite three fourths' majority, the court must weigh the interests of the creditors who support the scheme against those against, and ask itself whether the interest of those who support the scheme overwhelmingly outweigh the interests of those against.

[2] Where there is liability to pay a sum claimed in a s. 218 notice, then a failure to pay, whether by reason of carelessness, inadvertence, dilatoriness or mulishness, is 'neglect' within the wording of the statute.

[Application dismissed.]

Cases referred to:

Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad [1996] 3 CLJ 877 ***(foll)***

Deputy Commissioner of Taxation (Vic) v. Avram Investments Pty Ltd 9 ACSR 580 ***(foll)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649 ***(foll)***

Mann v. Goldstein [1968] 2 All ER 769 ***(foll)***

Re A Company [1915] 1 Ch 520 ***(foll)***

Re London and Paris Banking Corporation [1874] 19 LR 441 ***(foll)***

Re Tweeds Garages Ltd [1962] 1 All ER 121 ***(dist)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1990] 2 MLJ 31 ***(refd)***

The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 ***(foll)***

YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 3 CLJ 51 ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 176(3), 217(1)(b), 218(2)(a)
Companies Act 1985 [UK], s. 425
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 18 r. 8(1), O. 46 rr. 1, 2

Other sources referred to:

Buckley on Companies Act, 14th edn
Gore-Browne on Companies, 44th edn, vol 2, para 30.14.2
RM Goode's Principles of Corporate Insolvency Law, 1990 edn, p 15
Halsbury's Laws of England, 4th edn, vol 7, para 401

For the petitioner - Alex Yeo (SM Kam with him); M/s SM Kam & Assoc
For the respondent - CK Tan (CY Chung with him); M/s KC Yap Kamaludin & Partners

Reported by Anne Khoo

JUDGMENT

RK Nathan JC:

Background Facts To The Filing Of The Petition

On 19 January 1990 the petitioner had obtained a final judgment against Bukit Ritan Realty Sdn. Bhd. (BRR), a wholly owned subsidiary of the respondent in the sum of RM33,875 together with interest at the rate of 8% per annum from 15 March 1985 till the date of the notice made pursuant to s. 218 of the Companies Act 1965 (the Act) dated 8 January 1996. The said notice was for a sum of RM130,740.65.

Willway Industries Sdn. Bhd. (WISB) was a house purchaser which signed a sales and purchase agreement with BRR on 9 April 1995. WISB duly paid the 10% of the purchase price for the said property amounting to RM33,887.50. WISB subsequently changed its name to Wangsini Sdn. Bhd. (WSSB), the petitioner in the present proceedings. The petitioner rescinded the sales and purchase agreement with BRR and sued BRR for the refund of deposit and claimed liquidated damages for loss of rental income together with interest and costs. The plaintiff (WSSB, formerly known as WISB) obtained judgment in default on 19 January 1990. At all material times the present respondent and BRR were fully aware of this judgment, had never disputed it and had not attempted to appeal against it.

The Present Proceedings

The respondent had assumed all the debts owing to BRR under a Composite Scheme of Arrangement (the Schemes) pursuant to s. 176 of the Act which was subsequently sanctioned by the High Court on 4 January 1994 by way of Kuala Lumpur High Court Originating Summons No. D3-24-53-93 (the D3 suit). The petitioner had on 8 January 1996 issued a s. 218 notice for the sum of RM130,740.65 to the respondent. Thereafter the petitioner presented this winding-up petition on 30 January 1996.

Issues Not In Dispute

The petitioners highlighted the issues not in dispute, namely that:

(a) The sale and purchase agreement between the petitioner and BRR was rescinded by the petitioner on 25 October 1989.

(b) The petitioner had obtained judgment against BRR on 19 January 1990.

(c) The judgment debt as at the date of the statutory notice on 8 January 1996 is RM130,740.65 and that this debt has not as yet been paid by the respondent.

(d) The respondent has assumed all the debts and liabilities of BRR under the Schemes.

(e) Both the petitioner and the respondent are bound by the Schemes which were sanctioned by the High Court on 4 January 1994, approved by the respondent's shareholders in the Extraordinary General Meeting on 2 July 1993 and by virtue of s. 176(3) of the Companies Act 1965.

(f) Scheme E Option B under the Schemes together with other relevant clauses are applicable and all house purchasers are entitled to be paid by the respondent in full by cash RM1 for every RM1 owing by BRR.

(g) The s. 218 notice and the petition was filed and served in accordance with the Act and the Companies (Winding-Up) Rules 1972.

The Petitioner's Case

Relying on *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1992] 1 MLJ 313 the petitioner argued that the demand notice had not been complied with and that the respondent had, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the petitioner.

Further it was the case of the petitioner that since the petitioner had obtained judgment against BRR and that since subsequently the respondent herein had assumed all the debts and liabilities of BRR under the Schemes, the respondent has therefore neglected to pay the amount stated in the notice within the three weeks after service of demand and therefore the petitioner contended that the presumption of insolvency had arisen against the respondent. It was also pointed out to me that Scheme E and other provisions of the said Scheme, in particular cl. 41, confirmed, accepted and recognised judgments and made

provisions for the payment of judgment debt including costs and interest incurred thereon. The relevant clauses of the Schemes relied on by the petitioner are:

(i) The second limb of Cl. 41 which provides:

> All judgments, debts, interest thereon and costs relating to any debt owing by BRR shall be subject to Option B and shall be satisfied in the same manner as stated above.

(ii) Clause 2.1.5 under Scheme E which states clearly:

> House purchasers opting for Option B will be paid in full by cash a sum of RM1 for every RM1 owing.

(iii) Clause 2.6(b) which clearly and unequivocally provides that:

> House purchasers opting for Option B will be paid IN FULL by cash a sum of RM1 for every RM1 owing.

The emphasis is "IN FULL" and not the refund of 10% deposit.

It was the contention of the petitioner that having not opted for Option A, under the Schemes, the petitioner is therefore automatically entitled for Option B, i.e. that the petitioner is to be paid in full by cash RM1 for every RM1 owing, amounting to RM130,740.65.

(iv) Clause 48 which states:

> ... Payment to creditors under the Composite Schemes shall be completed as soon as possible after the effective date.

(v) Clause 34 reads:

> Grand United Holdings Bhd will acquire and assume from the various House Purchasers all the sums paid by them to BRR as at the Fixed Date and Grand United Holdings Bhd will give to the House Purchasers two (2) options as follows:
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> **Option A**
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> The House Purchasers opting for Option A will agree to rescind the original sale and purchase agreements and execute new sale and purchase agreements for the property described in the original sale and purchase agreements or similar property in the Project at the same price and to be completed and delivered within a period of twenty four (24) months from the date of the execution of the new sale and purchase agreements. The deposit and any further sums paid by the House Purchasers pursuant to

the original sale and purchase agreements shall be credited as part payment towards the purchase price under the new sale and purchase agreements.

Option B

The House Purchasers opting for Option B will be paid a sum of Ringgit Malaysia One (RM1-00) for every Ringgit Malaysia One (RM1-00) paid by the House Purchasers to BRR pursuant to the term of the sale and purchase agreements entered into between the House Purchasers and BRR.

(vi) Clause 39 reads:

The House Purchasers shall fully discharge and forgive the debts assumed by Grand United Holdings Bhd as aforesaid and all other debts and liabilities howsoever arising from the agreements between the parties under Scheme E in consideration of them opting for Option A or B referred to in Clause 35 above.

Scheme E refers to the Scheme of Arrangement under s. 176 of the Act to be made between the respondent and its subsidiaries and the house purchasers in its present form or subject to any modification thereof or addition thereto as may be agreed by the parties thereto or condition approved or imposed by the High Court of Malaya.

The petitioner contended that there are two categories of house purchasers, namely those with and those without judgments and that those with judgments must be paid the judgment sum including costs and interest to date of realisation and not the refund of the 10% deposit paid, irrespective of the judgment sum as contended by the respondent.

The respondent and BRR, having applied to the court under the D3 suit for a Composite Scheme of Arrangement, and pursuant to the order of that court, called for a meeting of shareholders of the respondent, various creditors and house purchasers of BRR through their solicitors by way of a notice dated 7 June 1993. This meeting was held on 2 July 1993 and the s. 176 Composite Scheme of Arrangement was approved. The respondent, on the same day served notice to the shareholders for an Extraordinary General Meeting (EGM) to be held at the same venue, and at that EGM approved a special resolution to give effect to the Composite Schemes. The relevant provision of the EGM relating to the house purchasers of BRR is Resolution 2.6 which reads:

The company do and hereby assume the debts owing by Bukit Ritan Realty Sdn Bhd (BRR) to the various House Purchasers of Taman Bukit Kepayang in Seremban, Negeri Sembilan Darul Khusus (hereinafter referred to as "the Project") who had entered into Sale and Purchase Agreements with BRR and

paid some monies towards the purchase price but did not get any house (hereinafter referred to as "House Purchasers") which as at the 30 day of June 1992 amount to RM2,104,511.92 and do and hereby pay and/or settle with the above-mentioned House Purchasers by way of two (2) options namely Option A and Option B to be given to them. The House Purchasers shall in consideration of them opting for either of the said options fully discharge and forgive the debts assumed by the company aforesaid and all other debts and liabilities howsoever arising from the said Sale and Purchase Agreements including all claim for damages for late delivery of vacant possession. The said options are as follows:

Option A

House Purchasers opting for Option A will agree to rescind the original sale and purchase agreements and execute new sale and purchase agreements with BRR for the property described in the original sale and purchase agreements or a similar property in the Project at the original purchase price to be completed and delivered within a period of 24 months from the date of the new sale and purchase agreements.

The amounts paid to BRR as at the 30 day of June 1992 will be credited as part payment towards the purchase price of the property under the new sale and purchase agreements.

Option B

House Purchasers opting for Option B will be paid by the Company in full by cash, a sum of RM1 for every RM1 owing."

Referring to the amount of RM2,104,511.92 under the special resolution 2.6 representing monies paid by the house purchasers being the 10% deposit, the said scheme provided for the repayment of RM1 for every RM1 paid by the house purchasers to BRR pursuant to the original sales and purchase agreement entered into between the house purchasers and BRR, under Option B.

After the approval of the said Schemes by the shareholders, various creditors and house purchasers of BRR on 2 July 1993, and later sanctioned by the High Court on 4 January 1994, the respondent, in implementing and giving effect to the said Schemes, made a separate provision in its 1994 accounts for a sum of over RM4 million, which was different from and higher than the RM2.1 million referred to earlier, in order to satisfy the judgments, costs and interest accrued thereon under the second limb of cl. 41 of the said Schemes, for payment of damages claimed by House Purchasers. The petitioners argued that the House Purchasers herein referred to were those with judgments. It was pointed out that the annual account of the respondent ending

31 December 1994 showed an amount of RM4.177 million surplus written back as "Provision no longer required for damages claimed by House Purchasers."

The petitioner thus submitted that the respondent had agreed that the house purchasers with judgments had to be paid in cash in full RM1 for every RM1 owing thereon on the judgment sum and costs and that it had also specifically made provisions in its 1994 accounts for such payment. The petitioner further argued that the special resolution 2.6, in reference to the sum of RM2,140,511.92 read together with cll. 34 and 39, clearly applied to house purchasers without judgments.

The petitioner urged upon me that had it not rescinded the sale and purchase agreement between itself and BRR and had it not obtained judgment, the petitioner would certainly have accepted the refund of 10% deposit that is RM33,887.50 pursuant to the original sale and purchase agreement. It was submitted forcefully for the petitioner that it was wrong for the respondent to insist and force the petitioner to accept a lesser amount from the judgment debt when there were clear provisions for such payment of judgment debt in the said Schemes and accounts.

The petitioner also pointed out that one other house purchaser, Lee Seng Mee (LSM) had successfully claimed damages and as a result of a court order, was duly paid by BRR. The petitioner questioned as to why the said LSM who had a valid judgment was paid in full, whereas this petitioner, who also had a valid judgment has been denied his just dues. This, it was submitted meant that the respondent was insolvent and didn't have liquid funds to satisfy its legal liabilities. This fact, it was pointed out, was supported by the respondent's audited accounts for 1994 which balance sheet as at 31 December 1994 showed an accumulated loss of RM10,812,000 and prior to that as at 30 June 1993 an accumulated loss of RM521,318,000. The petitioner therefore prayed for an order to wind up the respondent and for other consequential orders.

The Respondent's Case

The respondent contended that notwithstanding that the judgment in default obtained by the petitioner was against BRR which was a separate legal entity altogether, the plaintiff served a statutory demand notice under s. 218 of the Act on the respondent on 8 January 1996. Upon receipt of the said statutory notice, the respondent informed the petitioner's solicitors that a cheque for the sum of RM33,887.50 being a full cash refund of all monies paid by the petitioner on a ringgit for ringgit basis as provided under the said Schemes would be forwarded to it and requested the petitioner to stay its hand. The petitioner's solicitors kept the cheque forwarded to them by the respondent

for three months and subsequently, despite the request of the respondent to refrain from taking any further action, the petitioner commenced these winding-up proceedings and advertised the same. The respondent submitted that the petitioner's conduct in filing the petition was totally devoid of merit, extortionate, oppressive and an abuse of the process of the court and accordingly should be dismissed with costs. The respondent submitted that this petition was filed with the singular purpose of trying to coerce and to apply undue pressure on the respondent, a public listed company whose profit before taxation was RM23,459,000 for year ended 31 December 1995 and RM25,280,000 for the period ended 31 December 1994. It was submitted that the threat of a winding-up proceeding was to compel the respondent to pay to the petitioner, the debt which is owed by an entirely different legal entity, namely BRR. The respondent had raised various issues to resist the petition. Having considered all the arguments and the cases cited by both parties I dismissed the petition with costs. Since an appeal has been filed, I shall give my reasons under various heads.

Petition Is Oppressive Because Of The Scheme Of Arrangement Under S. 176 Of The Act

It is my judgment that the winding-up petition filed by the petitioner herein is oppressive, and is an abuse of the process of the court, for despite the fact that the petitioner was well aware that a Scheme of Arrangement under s. 176 of the Act (The Schemes) had been approved and sanctioned by the court by way of an order of court dated 4 January 1994, the petitioner had wilfully and blatantly chosen to flout the clear orders of the court and to disregard the law in this respect.

Section 176 of the Act empowers the court to sanction a scheme of arrangement proposed between a company and its members if the scheme is agreed to by a majority in number representing three fourths in value of the members present and voting in person or by proxy. Indeed once the scheme is approved and sanctioned by the court it becomes binding not only on the creditors, and also on the company but also on the liquidator, where the company has been wound up, and also on the contributories of the company. In other words, once the scheme is approved it assumes the characteristics of a statutory contract imposed by law on all parties who are affected by it, as is the case here (see *Buckley on the Companies Act,* 14th Edition). In fact, before approving or sanctioning the scheme, the court must be satisfied that the statutory provisions have been complied with, that the classes of creditors or members have been fairly represented by those who attended and that the statutory majority approving the scheme is acting in good faith in the interest of the class it professes to represent. The arrangement must also be such as a

man of business would reasonably approve and be fair and reasonable as regards the different classes if any, but the court will not sanction a scheme when the required majority is made up of persons not acting in good faith in the interest of the class to which they belong and it will also not sanction any scheme which involves the doing of an act which is *ultra vires* the company.

It is also the duty of the court in the exercise of its supervisory powers under s. 176 of the Act and the Court's discretion, in approving or disapproving an application for a scheme of arrangement under s. 176, to have regard to all the classes of creditors, whether secured or unsecured and the contributories and where the proposed scheme had obtained the requisite three fourths' majority, to place the interest of the creditors who overwhelmingly support the scheme, as in the instant case, as against those other creditors like the petitioner, in the instant case, and to ask itself whether the interest of those who support the scheme overwhelmingly far outweigh the interest of the petitioner.

In *Deputy Commissioner of Taxation (Vic) v. Avram Investments Pty Ltd* 9 ACSR 580, the appellant company owed the Deputy Commissioner of Taxation over $2 million. The appellant appealed from an order made pursuant to an application by the Deputy Commissioner, that it be wound up by the court. The appellant argued that the court should exercise its discretion against the application for winding-up, as a scheme of arrangement had been drawn up and was approved by the court, subject to the outcome of this appeal, and its implementation was in the interests of all creditors, including the Deputy Commissioner. In allowing the appeal the court held that in exercising the discretion to accede to or dismiss an application to wind up an insolvent company, the court may have regard to the wishes of the company's creditors. It may place the interests of those of the petitioning creditor against those of the remaining creditors and ask whether the interests of one outweigh the other, always having regard to the *prima facie* right of the petitioning creditor in those circumstances to obtain a winding-up order. Here the fact that the Deputy Commissioner was the only creditor who wished to proceed with the winding-up whereas the overwhelming majority of creditors voted for the scheme of arrangement, was decisive. For this reason alone the appeal was allowed.

By way of contrast in *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1990] 2 MLJ 31 where an insolvent company had proposed a scheme of arrangement to enable it to settle its outstanding debts, Siti Norma J (as her Ladyship then was) allowed an application by an unsecured creditor to throw out the s. 176 scheme of arrangement, as the scheme proposed was solely for the benefit of one class of creditors and she held that the test of

solvency of any company must be viewed in the commercial sense, that is, its inability to meet current demands irrespective of whether the company was possessed of assets, which if realised would enable it to discharge its liability in full.

The binding effect of the Scheme on all creditors, including the dissentient ones, is therefore accorded to it, by operation of law. In fact a Scheme under s. 176 (U.K. s. 425 of the Companies Act 1985) when sanctioned by the court cannot be varied or departed from, with the mere acquiescence of the shareholders and creditors (see *Gore-Browne on Companies* 44th Edn Vol. 2 para. 30.14.2).

Having perused the evidence tendered by both sides I find that the petitioner had in fact elected to opt under Scheme E, Option B. The petitioner cannot now go back on its election to claim for the full sum owing under the said judgment in default. In my view it would be plainly unconscionable to allow the petitioner to do so.

Once the Scheme has been approved, all creditors are bound and the court has power under the Act to order the distribution of assets otherwise than in accordance with the creditors' strict legal rights (see *R.M. Goode's Principles of Corporate Insolvency Law* 1990 Edition p. 15). Indeed, I hold that the classic feature of a court sanctioned scheme of arrangement pursuant to s. 176 of the Act, is its ability to bind the dissenting minority to the scheme in the event the scheme is approved by the requisite statutory majority of each class of creditors.

Another glaring feature of this case is that the petitioner is well aware that the Scheme of Arrangement had been approved and sanctioned by the court as can be evidenced by the contents of the s. 218 notice served by it on the respondent which makes clear reference to this Scheme. Yet despite being fully aware of the ramifications of the restraining order restraining all creditors and members of the company and the house purchasers, including the petitioner, whether by themselves, or by their servants and/or agents from commencing and/or continuing with all or any actions, proceedings and/or execution, including winding-up proceedings against the respondent and the binding effect of the court approved Scheme, I find that the petitioner here has wilfully disobeyed the said order by proceeding with the winding-up proceedings against the respondent.

It is my judgment that under s. 176 of the Act, if a scheme of arrangement is proposed by a company to its classes of creditors and if a majority in numbers representing three-fourths in value of the debt approve the scheme of arrangement and then it is subsequently approved by the court, the said

scheme becomes binding on the company and all its creditors to whom the scheme is proposed. The scheme, in the instant case, is one such scheme of arrangement which has secured the approvals of the requisite statutory majority of each creditor and sanctioned by an order of the High Court. The binding effect of the Scheme is therefore accorded to it by operation of law. Accordingly it is not open to the petitioner here to pursue another cause of action, that is by way of filing a winding-up petition to pressure the respondent to pay the alleged debt incurred by BRR once the petitioner had bound itself to the said Scheme of Arrangement.

Since the petitioner had admitted to being bound by the provisions of the Scheme of Arrangement (para. 10 of the affidavit of the Managing Director of the petitioner of encl. 8), the respondent is only legally obliged under the terms of the Scheme of Arrangement to pay a sum of RM33,887.50 to the petitioner and the amount was indeed paid to the petitioner through the petitioner's solicitors in January 1996 but this said cheque was subsequently returned to the respondent, 3 months later when the petitioner filed this petition to wind up the respondent. On this ground alone, this petition ought to be dismissed.

The argument of the petitioner that the restraining order against commencing any action including winding-up proceedings is limited to until after the applicants had conducted the meetings held pursuant to the order and further until after the Scheme of Arrangement has become effective, fails to consider the effect of s. 176 itself. The purpose and intent of s. 176 has to be given a wider import.

The Locus Standi Of The Petitioner

It is a *sine qua non* for a party to be entitled to file a winding-up petition against a company, that the party must come within one of the categories as set out in s. 217(1) of the Act which reads:

> 217. Application of winding up
>
> (1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the court on the petition of:
>
> (a) the company;
>
> (b) any creditor, including a contingent or prospective creditor, of the company;
>
> (c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;

(d) the liquidator;

(e) the Minister pursuant to s. 205 or on the ground specified in s. 218(1)(d);

(f) in the case of a company which is a licensed institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under s. 24(1) of the Banking and Financial Institutions Act 1989, or a non-scheduled institution in respect of which such Minister has made an order under s. 93(1) of that Act, Bank Negara Malaysia,

g) ...

or of any two or more of those parties.

It is evident from the facts that the petitioner had obtained judgment in default against BRR on 19 January 1990 and not against the respondent. Subsequently, by the operation of the Scheme of Arrangement the said judgment debt was abrogated by terms of the said scheme duly approved and sanctioned by the court pursuant to s. 176(3) of the Act. Consequently since Scheme E was binding on the petitioner, the amount to be refunded by BRR and not the respondent under the Scheme was the 10% deposit sum of RM33,887.50 paid by the plaintiff to BRR under the sale and purchase agreement dated 9 April 1985. As pointed out earlier it must not be forgotten that the Scheme of Arrangement as approved and sanctioned by the court is in respect of 3 legal entities, namely BRR, the respondent and Grand Credit & Leasing Ocean Development Bhd (GODB), which itself was a wholly owned subsidiary of the respondent and their respective creditors and members. Accordingly the respondent submits that the petitioner cannot assume that BRR's debts and obligations or financial burden would automatically or legally be assigned to the respondent, in the absence of any legal assignment to that effect. I was urged to find that the petitioner is not a creditor nor a contingent or prospective creditor of the company within the meaning of s. 217(1)(b) of the Act.

This submission is rejected. Under the terms of s. 176 of the Act the Schemes applied by the respondent and BRR, defined "creditors" as including house purchasers of the respondent and the respondent's subsidiaries as at 30 June 1992 and the respondent's subsidiaries clearly included both BRR and GODB. Further under heading "Settlement of Debts" it was stated clearly that "the debts of GUH subsidiaries, namely BRR will be assumed by GUH." In the circumstances, I find that the petitioner had *locus standi* to file this winding-up petition.

Does Section 6(3) Of The Limitation Act 1953 Make The S. 218 Demand Notice Bad

It was the submission of the respondent that even assuming that the respondent was liable on the judgment in default obtained by the petitioner/plaintiff against BRR, the judgment order obtained by the plaintiff dated 19 January 1990 was as follows:

(a) The sum of RM33,887.50 with interest at the rate of 8% per annum from 15 March 1985 to the date of full realisation.

(b) Liquidated damages of RM44,429.25 with interest thereon at the rate of 8% per annum with effect from 6 November 1989 to date of realisation.

(c) Costs of RM1,150.

These three sums totalled RM130,740.55 as at 8 January 1996, which was the date of the s. 218 notice of demand. In fact the said statutory notice reflected the three items mentioned herein. The respondent relied on s. 6(3) of the Limitation Act 1953 and submitted that the interest ought to have been calculated on clauses (a) and (b) for 6 years only from 15 March 1985 and 6 November 1989 respectively. Since the interest herein was calculated up to 8 January 1996 the said notice was bad in law and the winding-up petition a nullity.

Having considered the submissions of both parties I agree with the respondent that s. 6(3) of the Limitation Act 1953 will have a telling effect on the statutory notice of demand. Section 6(3) of the Limitation Act 1953 reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment become enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six (6) years from the date on which the interest became due.

I find that the petitioner is only legally entitled to claim interest on the judgment in default obtained on 19 January 1990 for 6 years from the date on which the interest became due, that is to say:

(a) for the principal sum of RM33,887.50 from 15 March 1985 to 14 March 1991.

(b) for the liquidated damages of RM44,429.25 from 6 November 1989 to 5 November 1995.

It is not correct to have calculated interest up to 8 January 1996 as was worked out in the statutory notice of demand dated 8 January 1996.

In essence there are two limbs to s. 6(3) of the Limitation Act 1953; the first in relation to the enforcement of any judgment and the second with regard to the recovery of arrears of interest in respect of any judgment debt. What is obvious is that the period of limitation of cases that fall under the first limb is 12 years and for cases under the second limb, 6 years, interest to run from the date on which the interest became due. The petitioner argued that it was wrong for the respondent to submit that the 6-year period is to include the pre- and post-judgment period.

It was the petitioner's submission that the words "judgment debt" in s. 6(3) must mean from the date the judgment was entered and in this case it was on 19 January 1990. Therefore since the notice was dated 8 January 1996 the petitioner contended that the calculation of interest was within the 6-year period since date of judgment.

This submission would have been acceptable if no interest was mentioned in the order and in which case the statutory rate of interest at 8% per annum from date of judgment would prevail. However in the instant case the order clearly spelt out when the interest would commence in respect of both the principal sum and the liquidated damages. The principal sum, the liquidated damages and the costs, all crystallized on 19 January 1990 to become the judgment debt.

However, the second limb of s. 6(3) allowed parties the right to set the date on which the interest became due. Since the judgment in default has not been set aside and subsists, I must accept the dates when the respective interests begin to run, as the dates stipulated in the said order.

The excess interest wrongly claimed by the petitioner has been calculated by the respondent as amounting to RM13,691.36. Since this figure has not been disputed by the petitioner I accept it as correct.

The next question I have to consider is, assuming the judgment is correctly enforceable against the respondent herein, whether I ought to, as was urged upon me by the petitioner, to following the decision of Mr. Justice Plowman in *Re Tweeds Garages Ltd* [1962] 1 All ER 121 wherein his Lordship said at p. 124:

> ... Moreover, it seems to me that it would in many cases be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine *bona bide* dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: "It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?" I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.

The petitioner also relied on *YPJE Consultancy Service Sdn. Bhd. v. Heller Factoring (M) Sdn. Bhd. (formerly known as Matang Factoring Sdn. Bhd.)* [1996] 3 CLJ 51 where in a recent decision Ahmad Fairuz Sheikh Abdul Halim JCA declined to follow the literal interpretation of the meaning of the sum demanded which would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed debt exceeding RM500 had remained unpaid after making a proven demand without any reasonable explanation being advanced for that failure to do so. He preferred the wider interpretation in that, so long as there was an admitted debt of over RM1,000 there was no need to state the precise amount due in the notice of demand.

It is noteworthy that in both *Re Tweeds Garag*e and in *YPJE Consultancy Service* the courts held that so long as a sum was admitted as being owed and so long as that admitted sum exceeded the minimum sum referred to in the relevant sections, of the respective Acts, a winding-up order ought to be granted.

The significant difference in the instant case is that the actual admitted sum of RM33,887.50 was in fact paid by the respondent to the petitioner but the said cheque for the said sum was subsequently returned to the respondent 3 months later when the petitioner filed this winding-up petition. Therefore the *ratio* of these two cases will not apply here as there is no longer an admitted sum, and the rest is in dispute.

The Position Of The Statutory Notice

It is my finding that since the statutory notice pursuant to s. 218 of the Act is a pre-requisite to the commencement of a winding-up petition under that section, and if that statutory notice is defective in its demand, then the basis for the winding-up petition has collapsed, and *ipso facto*, the winding-up petition must be dismissed.

I further hold that in this case since the petitioner had in its quantum of demand in the statutory notice, included a sum caught by s. 6(3) of the Limitation Act 1953, the entire notice is bad in law. Limitation is a valid defence and in fact O. 18 r. 8(1) of the Rules of the High Court 1980 (the RHC) specifically require limitation to be pleaded. Such is the importance placed upon the defence of limitation. It is not appropriate and indeed it would be a travesty of justice if I were to sever the claim and deduct the sum of RM13,691.36 from the petition being the excess claimed after limitation had set in. Even if severance can be done to the petition, can the court rewrite the statutory notice of demand. I am therefore bound to find that the said statutory notice dated 8 January 1996 is bad in law and therefore on this ground too, this petition ought to be dismissed.

The Debt Is Bona Fide Disputed

The respondent agreed to take over the debts and liabilities of BRR pursuant to the Scheme of Arrangement under s. 176 of the Act. The respondent has never agreed with the petitioner in writing or otherwise to be fully liable for the debts and liabilities of BRR *per se* or in its entirety except in the context of the said court-sanctioned scheme of arrangement. The respondent cannot be held responsible for the debts of its subsidiary company, BRR. Moreover, pursuant to clause 39 of the said Scheme of Arrangement, it was agreed that the house purchasers, who now include the petitioner, shall fully discharge and forgive the debts assumed by the respondent and all other debts and liabilities howsoever arising from the agreements between the parties under Scheme E in consideration of them opting for Option A or B which has been earlier referred to. In fact clause 40 is even more specific. It says that the respondent shall administer and complement Scheme E in its entirety as agent for and on behalf of BRR and without any personal liability whatsoever on its part. Clause 41 provides that all judgments, debts, interest thereon and costs relating to any debt owing by BRR shall be subject to this Scheme E and be satisfied in the same manner as stated above and the house purchasers shall be prohibited from instituting or commencing proceedings, levying any writ of execution or other similar actions against BRR in relation to the debts stated herein or any claims or counterclaims by BRR against the house purchasers or any of them.

Clause 43 provides that as from the effective date, all previous arrangements, agreements, compromise, commitments, negotiations and moratorium entered into between BRR and the house purchasers shall be superseded by this Scheme E.

Considering all these clauses which are self-explanatory I find that there is no *bona fide* existing debt as between the respondent and the petitioner entitling the petitioner to present this petition to wind up the respondent. In *Mann v. Goldstein* [1968] 2 AER 769 it was held that where a debt was disputed on substantial grounds then the petitioner was not a creditor within the meaning of the relevant section and in this case s. 217 of the Act. *Mann v. Goldstein* was cited with approval by Zakaria Yatim J (as his Lordship then was) in *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 3 MLJ 49 where he said at p. 50:

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent company is a debtor ...

On this ground too I ought to dismiss this petition.

Company Is Not Insolvent Nor Is It Unable To Pay Its Debts

The respondent is a public listed company on the main board of the Kuala Lumpur Stock Exchange (KLSE). The respondent's preliminary Final Statement on Consolidated Results as at 31 December 1995 exhibited as CCY1 to encl. 11 and a further affidavit of the accountant of the respondent, Choong Ah Ling (encl. 13) confirm that the profit before taxation was RM23,459,000 as at 31 December 1995 for the group and that the respondent itself had made a profit before taxation of RM2,136,000 as at 31 January 1995. Further, in the audited accounts of the respondent, the balance sheet as at 31 December 1994 showed a total cash deposit of RM5,754,000 deposited with various licensed banks and financial companies. The earnings in cents per ordinary share of RM1 was 7.78 cents and the net tangible assets backing per ordinary share was RM0.96. From the above facts, it is my finding that not only is the respondent financially sound, it is also commercially solvent and is fully capable of meeting any current liabilities. In *Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad* [1996] 3 CLJ 877 I had in considering a similar situation in respect of another public listed company, held that a court should consider the overall assets and liabilities of a company and not rely merely on the quick assets test to decide on a company's solvency or otherwise. Applying the overall assets and liabilities test, as I did in the *Idris Hydraulic* case, I cannot but find the respondent commercially solvent and able to meet its debts and especially the disputed sum of RM130,740.65 as claimed by the petitioner herein.

Section 218(2)(a) of the Act reads as follows:

> Definition of inability to pay debts
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> (2) A company shall be deemed to be unable to pay its debts if:
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> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

There is clear evidence that there was no "neglect" on the part of the respondent to pay the sum demanded. The non-payment was by design. In *re London and Paris Banking Corporation* [1874] 19 LR 441 at 446 Sir G. Jessel MR said on a similar issue as follows:

> ... It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted." Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is *bona fide* disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute.

I therefore find that where there is a serious dispute as to the sum claimed and that on this genuine and strenuous ground, based on substantial material and belief, a respondent fails to pay the sum demanded, such failure to pay cannot fall within the meaning of neglect as in the statute. However if there liability, then a failure to pay whether by reason of carelessness, inadvertence, dilatoriness or mulishness, is neglect within the wording of the statute. The dividing line is the genuine challenge to the issue of liability. Once this challenge is raised there is no longer a basis to found neglect within the meaning of s. 218(2)(a).

Is Leave Of Court Required Pursuant To O. 46 r. 2 Of RHC 1980

The respondent argued that since the judgment was obtained on 19 January 1990 and the winding-up petition filed on 30 January 1996 which was clearly 6 years later, the petitioner ought to have obtained the leave of court pursuant to O. 46 r. 2 of the RHC. Order 46 r. 2 is reproduced:

2 When leave to issue any writ of execution is necessary (O. 46 r. 2)

(1) A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:

(a) where six years or more have lapsed since the date of the judgment or order;

(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

(c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;

(d) where under the judgment or order any person is entitled to relief subject to the fulfilment of any condition which it is alleged has been fulfilled;

(e) where any movable property sought to be seized under a writ of execution are in the hands of a receiver appointed by the court.

(2) Paragraph (1) is without prejudice to any written law or rule by virtue of which a person is required to obtain the leave of the court for the issue of a writ of execution or to proceed to execution on or otherwise the enforcement of a judgment or order.

(3) Where the court grants leave, whether under this rule or otherwise, for the issue of a writ of execution and the writ is not issued within one year after the date of the order granting such leave, the order shall cease to have effect, without prejudice, however, to the making of a fresh order.

Since no leave was obtained, the respondent submitted that on this ground too, the petition ought to be dismissed.

The petitioners countered by submitting that since the statutory notice of demand was served on the respondent on 8 January 1996, that is before the expiration of 6 years, the petition was lawfully filed and no leave was required.

I had in *The Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor.* [1996] 4 CLJ 828 held that the RHC do not apply to a petition filed under s. 218 of the Act, as in this case. The Court of Appeal had on 9 December 1996 affirmed the said decision. In the circumstances, O. 46 r. 2 will not apply to these proceedings which is based on a s. 218 notice.

a In any event O. 46 r. 1 which is the definitive section states:

> 1 Definition (O. 46 r. 1)
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> In this Order, unless the context otherwise requires, "writ of execution" includes a writ of seizure and sale, a writ of possession and a writ of delivery.

b Obviously winding-up proceedings do not come within "writ of execution." In *Re A Company* [1915] 1 CH 520 the question before the court of Appeal was whether the execution on a judgment included the petition of winding-up of a company. Lord Cozens-Hardy MR said at p. 525:

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> ... Now "execution on the judgment" is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding-up petition is not execution on a judgment. It lacks almost every element of such an execution.

d *Halsbury's Laws of England* 4th Edn. Vol. 7 para. 401 in describing the meaning of execution clearly states that execution does not include a petition to wind up a company.

It is my judgment that in respect of a winding-up petition commenced pursuant to s. 218 of the Act there is no requirement that the petitioner ought to obtain *e* leave of court pursuant to O. 46 r. 2 of the RHC.

Considering all the circumstances, I dismissed the petition with costs.

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